



STATE OF INDIANA

MICHAEL R. PENCE, Governor

**PUBLIC ACCESS COUNSELOR
LUKE H. BRITT**

Indiana Government Center South
402 West Washington Street, Room W470
Indianapolis, Indiana 46204-2745
Telephone: (317)233-0906
Fax: (317)233-3091
1-800-228-6013
www.IN.gov/pac

November 9, 2015

Mr. Christopher Cooper, Esq.
Law Office of Christopher Cooper, Inc.
79 West Monroe Street. Suite 1213
Chicago, Illinois 60603

Re: Formal Complaint 15-FC-261 (Priority); Alleged Violation of the Open Door Law by the Town of St. John Metropolitan Board Police Commissioners

Dear Attorney Cooper,

This advisory opinion is in response to your formal complaint, which alleges the Town of St. John Metropolitan Board Police Commissioners ("Board") violated the Open Door Law ("ODL"), Ind. Code § 5-14-1.5-1 *et. seq.*

The Board has responded via Counsel Mr. David Austgen, Esq. His response is enclosed for your review.

Pursuant to Ind. Code § 5-14-3-3, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on September 25, 2015.

BACKGROUND

Your complaint dated September 25, 2015 alleges the Board violated the Open Door Law by denying access to a public meeting.

Your client through your representation of the Fraternal Order of Police was subject to scheduled hearings before the Board. You assert those meetings should have been open to the public. It is your contention the Open Door Law applies to the Board as Ind. Code §36-8-9 specifically mentions all town government.

You also cite *Merrillville v. Blanco*, 687 N.E.2d 198 (Ind. 1998). Wherein, the Indiana Court of Appeals held that a Merrillville Board of Metropolitan Police Commissioners improperly conducted meetings which were not accessible to the public. The Court determined that "termination of a police officer from a local police department involves a public matter which is of primary interest to the public."



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The Board responded that it conducts disciplinary hearings pursuant to Ind. Code § 36-8-3-4(c) in executive sessions. As authorization for such proceedings, it cites *Town of Merrillville, v. Peters*, 655 N.E. 2d 341 (1995). In *Peters*, the Indiana Supreme Court expressly interpreted the Open Door Law provision on executive sessions to permit adjudication of administrative police commission hearings.

ANALYSIS

It is the intent of the ODL that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. Ind. Code § 5-14-1.5-1. Except as provided in section 6.1 of the Open Door Law, all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them. Ind. Code § 5-14-1.5-3(a).

A similar matter was addressed by the Indiana Public Access Counselor in *Advisory Opinion 09-FC-144*. Counselor O'Neal opined the following:

An "executive session" is a meeting from which members of the public are excluded, but a governing body may invite anyone necessary to carry out the board's business. See I.C. § 5-14-1.5-2(f).

An executive session may be held for the following purpose, among others:

With respect to any individual over whom the governing body has jurisdiction:

- (A) to receive information concerning the individual's alleged misconduct;
- and
- (B) to discuss, before a determination, the individual's status as an employee...

I.C. § 5-14-1.5-6.1(b)(6).

...As the City contends, the Indiana Supreme Court has addressed a situation similar to this in *Town of Merrillville v. Peters*, 655 N.E.2d 341 (Ind. 1995). There, the court held it was permissible for the board to conduct the pre-termination hearing in executive session. Id. at 343. The court said that absent a statute requiring the hearing to be conducted in a public meeting, the hearing could be conducted in executive session because the subject matter was



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appropriate for executive session. Id. The court said “an administrative hearing need not be public to be full and fair.” Id.

The matter here is similar to that addressed in *Town of Merrillville*. I find no statute requiring the pre-termination hearing concerning your employment to have been conducted in a public meeting. You were present and represented by counsel at the hearing. The subject matter of the hearing was appropriate for executive session, based on I.C. § 5-14-1.5-6.1(b)(6). As such, it is my opinion the City did not violate the ODL.

That being said, the Office of the Public Access Counselor may not issue an advisory opinion concerning a specific matter with respect to which a lawsuit has been filed under the Open Door Law. See Ind. Code § 5-14-4-10(6). It is my understanding this scenario has occurred. Therefore, this Opinion is for educational purposes only and should not be used as persuasive authority in the instant matter.

To the extent the factual circumstance is substantively identical to the facts leading to the Opinion in *Advisory Opinion 09-FC-144* and the *Peters* case, this Office is bound by Indiana Code and the rulings of the judiciary. However, it should be noted the *Peters* case was ruled upon in 1995 before the creation of the Office of the Public Access Counselor. The Supreme Court appears to have viewed the matter through the lens of due process for the individual officer involved.

The Office of the Public Access Counselor, however, advises public officials (including the judiciary) on the Open Door Law from the perspective of an advocate for public access and transparency. See generally, Ind. Code § 5-14-4-10. Counselor O’Neal’s Opinion notwithstanding, an advisory opinion issued in 1990 - when the facts of *Peters* arose - likely would have analyzed the matter accordingly. If so, an Opinion may have been more in line with the dicta contained in *Merrillville v. Blanco*, 687 N.E. 191 (Ind. Ct. App. 1997) which states “the termination of a police officer from a local police department, involves a public matter which is of primary interest to the general public.”

Granted, the hearing proceedings in *Blanco* sprung from a different enabling statute than *Peters*, however, the *Blanco* ruling explicitly considered access by interested spectators. The *Peters* Court focused on due process for the officer, but does not appear to have taken into consideration the intent of the legislature when promulgating the Open Door Law:



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It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. The purposes of this chapter are remedial, and its provisions are to be liberally construed with the view of carrying out its policy.

Executive sessions are the exception to public meetings. "Indiana's Open Door Law must be liberally construed in order to give effect to the legislature's intention; moreover, all doubts must be resolved in favor of requiring a public meeting and all exceptions to the rule requiring open meetings must be narrowly construed." *Gary v. Maclin*, 772 N.E.2d 463, (Ind. Ct. App. 2002). The Board concedes it is subject to the Open Door Law, however, Ind. Code § 36-8-9 does not expressly provide for an executive session to conduct its meetings.

While *Peters* is certainly the controlling case, an argument could be made to question whether the Supreme Court viewed the matter from strictly a due process perspective or with governmental transparency considerations in mind. This Office concerns itself with the latter. Although it may be permissible, there should always be a compelling reason as to why a governing body should hold its proceedings behind closed doors. Accordingly, it is the recommendation of this Office that the Town of St. John Metropolitan Police Board of Commissioners reevaluate its stance on holding administrative hearings in executive sessions.

Regards,

A handwritten signature in black ink, appearing to read "LHB", is written over a horizontal line.

Luke H. Britt
Public Access Counselor

Cc: Mr. David Austgen, Esq.